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In the
Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1441

KEVIN H. WHITE,
MAYOR OF THE CITY OF BOSTON,
PETITIONER,

v.

TALLULAH MORGAN, ET AL., and
JOHN J. KERRIGAN, ET AL.,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR RESPONDENTS TALLULAH MORGAN, ET AL., IN OPPOSITION

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Respondents (plaintiffs below) Tallulah Morgan, et al., black parents and their children attending the Boston public schools, oppose the petition for certiorari of Kevin H. White, as Mayor of the City of Boston.

Opinions Below

The opinion of the District Court as it appears in the Petition's Appendix (App. 54a-108a) lacks a few parts of the desegregation plan adopted below (see App. 90a, 94a, 98a, 99a, 108a, noting omissions). The complete opinion appears in the appendix to the Boston School Committee's petition, No. 75-1445 (hereinafter "No. 75-1445, A.") pp. 57-207.

Statement of the Case

The case described in the Petition is simply not the case presented by the record.

1. The lower courts did *not* "ignore such factors as the amount of busing, cost, community acceptance, and potential for resegregation" (Petition, p. 28), but conducted precisely the analysis called for by this Court. Reduction of busing was a repeatedly emphasized goal (App. 71a, 76a, 77a, 79a, 83a, 98a, 99a, 101a, 102a). The District Court estimated (App. 77a, 101a) that its plan would bus 21,000 out of 84,000 students, as compared to 17,000 being bused under the plan then in effect, originally imposed under state law (App. 13a, 62a, 101a, 102a; *School Committee of Boston* v. *Bd. of Educ.*, 1973 Mass. Adv. Sh. 1315, 302 N.E.2d 916), and to more than 30,000 using buses or public transportation under the segregated system (App. 77a). The average bus trip under the court's plan takes 10-15 minutes, and the maximum less than 25 minutes (App. 101a). The court also made findings as to the costs —and the savings and opportunities for outside funding— required by the plan (App. 84a, 102a, 103a); it did not discuss Boston's budget (Petition, pp. 10-12), for the simple reason that the budget was not introduced into evidence by any party. Neither was there any evidence

as to "community acceptance" of varying plans, but the District Court nevertheless strove to maximize acceptance through such means as securing community participation in the framing (App. 64a-65a) and implementation (App. 86a-87a, 103a-106a) of relief, designing community school districts responsive to the needs of parents and students (App. 74a-75a, 88a-89a), providing for attractive and innovative magnet schools (App. 73a-74a, 85a-85a, 94a-99a; No. 75-1445, A. 166-74), and eliminating divisive discrimination (e.g., App. 72a-73a, 77a-78a, 89a). Avoidance of resegregation was likewise on the court's agenda, and led to the very revisions in the Masters' Plan which the Petitioner objects to (App. 75a) as well as influencing other matters (App. 76a-77a, 78a). If by "resegregation" the Petition means the theory that desegregation causes "white flight" to the suburbs, the District Court considered that aspect too, concluding that the likelihood of such flight was factually unproven (App. 71a n. 7) and legally irrelevant (App. 71a-72a).

2. The characteristics of the Masters' Plan described in the Petition (pp. 14-16, 20, 23-25) are not those of the Masters' Plan actually submitted; the real plan would have left almost half the schools in Boston segregated. It is true that the Masters projected that the districts then proposed would yield roughly the racial percentages and amount of busing described in the Petition. But new data, received after the Masters reported, made it plain that their propections were wrong, and indeed "clearly erroneous" (App. 14a & n. 13, 15a n. 14, 74a-75a). The Court of Appeals set forth the situation as follows (App. 15a n. 14):

	Masters' final report	New figures applied by court to masters' districts	Possible result of allowed deviation of ±10 percentage points within each school
West Roxbury	80% W	93% W	100% W
South Boston	60% W	67% W	77% W
Burke	50% B	63% B	73% B

These three districts contained 21, 15 and 13 schools, respectively, out of the 163 schools in the plan. (Masters' Report, App. E.)

The Masters thus took a school system which was 52% white (No. 75-1445, A. 177), and came up with a plan under which 29 schools in the Burke and Madison Park districts would be 30% or less white, while 34 schools in West Roxbury and East Boston would be 93% or more white.[1] Their plan "would define overwhelmingly white areas of the city, such as West Roxbury and South Boston, close to heavily black and Hispanic areas such as the Burke district" (App. 75a). The Masters did not try to justify this result on safety, distance, cost, or other grounds, since they—using erroneous projections—had foreseen an entirely different result. When corrected in the light of the new data, moreover, their plan had a shortage of at least 6000 community district seats, particularly in black districts (App. 15a n. 14, 75a).

The Petition's use of figures resembling the Masters' "clearly erroneous" (App. 14a n. 13) racial projections is inconsistent with the findings of both lower courts (App. 14a n. 13, 74a-75a) and with the Petitioner's own position in the Court of Appeals. His brief there conceded (p. 24 n. 1) that the Masters' projections were inaccurate, but argued that the Masters' districts could have been redrawn to yield the percentages they projected, without increasing busing or posing other problems. The Court of Appeals found this theory "significantly vulnerable" (App. 15a n. 15), and no attempt to carry it out has ever been submitted to any court.

Here, the Petitioner advances for the first time another

[1] Under the Masters Plan (App. E), the Madison Park district (16 schools) was 30% white and the East Boston District (11 schools) was 95% white. Schools in each district could vary up to 10% from the district ratio (App. 15a n. 14). Since the students in the minority in a district would be most likely to wish to go to magnet schools or make other transfers out of the district, this leeway would probably result in still more segregation than appears in the text.

contention (pp. 19-20, 24-25). *First,* he replaces the projections made by the Masters and found "clearly erroneous" with others which resemble the Masters' projections but have never been advanced before and are still less credible. Where the Masters projected their West Roxbury district as 80% white and the lower courts found 92% or 93% white more accurate (App. 15a n. 14, 74a), the Petition asserts that this district would have been only 77% white (p. 23). The same process has occurred at the South Boston district (App. 74a; Petition, p. 23), and similar changes are made elsewhere. *Second,* the District Court's projections for its own plan (No. 75-1445, A. 127, 131, 135, 139, 143, 147, 151, 157, 177), unchallenged below, are silently replaced by slightly different figures of unclear provenance (Petition, p. 23). *Third,* the *actual results* obtained under the court's plan — not so desegregative as had been hoped[2] — are compared to the results *projected* by the Petitioner for the Masters Plan, thus retroactively vindicating the latter. The Court should not entertain this effort to disregard the findings of two lower courts on the basis of claims and evidence never submitted to them. In any event, there is every reason to believe that the Masters' Plan would have fallen short of its goals still more than the court's plan did, since it was not based on up-to-date information. In light of the new data, the Masters' Plan projections (and still more so those now advanced by the Petition for that plan) could be met only if white students voluntarily flocked to black schools in black residential areas outside their own community districts, and vice versa. The lower courts (had such a proposal been made to them) were obviously not required to rely on speculations of such a result and to disregard the data actually before them.

3. The Petition relies on numerous factual claims not supported by the record. It discusses Boston's ethnography

[2] The figures in the Petition are, however, misleading, even assuming the propriety of comparing actual with projected figures.

(pp. 10, 17-18), budget and taxes (pp. 19-12), and public opinion (pp. 16-17). The discussion contains inaccuracies and is not supported by evidence of record, which is why the Petition relies on newspaper articles, a bond prospectus, and assertion. It later relies (pp. 22-26) on documents filed in the District Court many months after its desegregation plan was adopted, and even after the Court of Appeals' affirmance. As explained above, the Petition introduces without explanation projections for the Masters and District Court plans inconsistent with factual findings unchallenged on appeal. Nor did the Petitioner argue in the Court of Appeals that the Masters Plan's costs were relevant.

4. The lower courts did not render meaningless (Petition, pp. 28, 33) or eviscerate (p. 32) the Equal Educational Opportunities Act of 1974. The findings called for by the Act (20 U.S.C. § 1713) were made (App. 101a-102a). The Act's designation of busing as the remedy of last priority was honored by extensive and successful efforts to minimize busing (App. 71a, 76a, 77a, 79a, 83a, 98a-102a). The Act's sponsorship of magnet schools (20 U.S.C. § 1713(f)) was recognized by a magnet program at about 25 schools (App. 73a, 84a-86a, 94a-99a; No. 75-1445, A. 166-74), daring indeed in view of the failure of magnet plans elsewhere (App. 11a). The "closing of inferior schools" (20 U.S.C. § 1713 (e)) was effectuated in twenty instances (App. 83a-84a). Student transfers (20 U.S.C. § 1713(c); App. 101a) and new construction already under way (20 U.S.C. § 1713(e); No. 75-1445, A. 132, 136, 152-53, 171-72) were relied on. The Act's preference for "neighborhood" schools (20 U.S.C. § 1701(a)(2)) was fulfilled by the creation of community school districts (App. 74a, 88a-90a) more conservative than the pairing of separated areas in the inner city and outskirts approved in cases such as *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 9-10, 27-29 (1971). And the Act's mandate that "the provisions of this chapter

are not intended to modify or diminish the authority of the courts of the United States to enforce fully the fifth and fourteenth amendments" (20 U.S.C. § 1702(b)) was given its proper place in a fair construction of the Act (App. 13a-20a).

5. The Petition mistakenly suggests (pp. 19, 21) that the Petitioner was deprived of a chance to participate meaningfully in the plan's preparation. It is not true that "the court refused to admit any evidence as to community acceptance of the two plans or possible resegregation" (p.21). Such slight evidence as was offered on resegregation was admitted, taken into account in some ways (App. 75a-78a), and found unpersuasive (App. 71a n. 7) and irrelevant (App. 71a-72a) in others. Nor is it true that the parties had only one day to prepare comments on the court's proposals for changes in the Masters' Plan (p. 19). The proposals were distributed on April 17, 1975, oral comments were heard the next day, and written comments received on April 22. Even after that, parties were free to seek leave to comment further, and the Petitioner himself filed a proposal on April 29 (Motion of the Mayor etc. with Respect to the Southwest I Project).[3]

This case, indeed, presents a model of full participation in the drafting of a desegregation plan over a period of at least seven months. The local school authorities had every opportunity to frame their own plan, but even after having been held in contempt they failed to come up with anything better than freedom of choice with ineffective educational trimmings (App. 9a-13a, 62a-67a). Parties, intervenors, and numerous community groups which submitted written comments had the chance to help frame

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[3] The Petition makes assertions (p. 19) about the disclosure of the proposals to the Masters, which are not based on anything in the record. Since the Masters had been commissioned only to submit their recommendations (App. 14a n. 13) and had already done so, there was in any case no need to consult with them. The court-appointed experts, however, were still on hand, and helped the District Court. (App. 50a-51a, 65a).

guidelines (App. 63a), submit plans (App. 64a), criticize plans (*id.*), comment on criticisms (App. 65a), offer evidence, proposed findings and oral argument to the Masters (See App. 65a), comment to the Masters on their draft report (*id.*), submit written and oral critiques of the Masters' Plan (*id.*), and comment on the court's proposed revisions (*id.*). Considering that the finding of a constitutional violation occurred on June 21, 1974 (App. 62a), the court may even have allowed too much time for this process. See *Carter* v. *West Feliciana School Bd.*, 396 U.S. 290 (1970). By the time the plan was ready, the defendants could urge that it was too late for implementation in 1975. *Morgan* v. *Kerrigan*, 523 F.2d 917, 923-24 (1st Cir. 1975).

The conflicting petitions (Nos. 75-1441, 75-1445, 75-1466) filed in this Court demonstrate that this case has featured, not too little opportunity for participation, but rather too many defendant cooks, pressing inconsistent recipes on the courts. It is the Boston School Committee, an elected body, which bears the responsibility for the Boston schools except as to certain budgetary increases. 379 F. Supp. at 421-22.[4] The Committee's petition (No. 75-1445) does not challenge the student assignments ordered by the District Court except as to the three examination schools. But the Mayor (No. 75-1441) and Home and School Association (No. 75-1466) would throw the whole student assignment plan back

[4] Indeed, the Mayor's standing to file this petition is more than dubious. While the Mayor was joined as a defendant for safety and financial matters, the joinder order provided that with respect to "proposals relating to long-range desegregation plans, the primary responsibility of the City of Boston for these matters is placed with the original city defendants, the Boston School Committee and Superintendent. Therefore, the court will entertain such proposals from the Mayor only after they have been presented to the school committee. If . . . the school committee does not adopt such proposals or present them to this court through its counsel, the court will on application hear any such proposals or other motions from the Mayor." (Order Joining Kevin H. White . . . , 9/30/74). The Mayor never followed this procedure nor sought dispensation from doing so. See also *Chicago* v. *Chicago Rapid Transit Co.*, 284 U.S. 577 (1931).

into the pot. The School Committee petition asserts that the lower courts improperly sought educational improvements. The Mayor's petition, however, urges that meaningful desegregation requires "a quality education for all" (p. 32; see pp. 13, 16, 31). Meanwhile the Home and School Association, "an agency within the school department" whose participation in this case is funded by the city (1975 Mass. Acts, ch. 716), advances still a third set of claims. As the lower court opinion shows, every conceivable relevant factor and theory has been pressed in this case and fully considered.

Argument

The issues which the Petition claims to see in this case are not there. The District Court did what a court should do, taking a plan which without justification would have left numerous racially identifiable, segregated schools, and making the modifications needed to make it "promise realistically to work *now*." *Green* v. *County School Bd.*, 391 U.S. 430, 439 (1968). There was no search for racial balance, no disregard of practicalities, and no evisceration of statutes. The case received earnest and complete attention from two able courts, in complete accord with this Court's decisions. The Petition's attempt to revive here a plan based on erroneous factual assumptions is wholly inconsistent with the established principle that the District Courts have broad discretion to evaluate competing plans when local school authorities default.

A. The "Two Court Rule" Bars Further Review.

All of the Petition's claims rely on the premise that the District Court "had before it two different plans both of which would eradicate school segregation 'root and branch' " (p. 2). This pervasive (pp. 2, 3, 4, 20, 28, 29, 30, 32, 34) premise in turn rests on the assertion (pp. 15, 22-25) that the Masters' projection of the results their plan

would obtain was accurate.[4a] The District Court, however, acting on the basis of evidence not considered by the Masters, found that those projections were wrong (App. 74a-75a; see Statement of the Case, part 2, above). The Court of Appeals agreed that "both as to racial composition and numbers of students in the districts, the new figures rendered the factual assumptions underlying the masters' determination clearly erroneous" (App. 14a n. 13). This Court should not review findings of fact concurred in by two lower federal courts, as would be required in order to accept any of the Petition's claims. E.g., *Berenyi* v. *District Director, INS*, 385 U.S. 630, 635 (1967).

B. This Case Presents No Issue of Disregard of Practicalities in Framing Desegregation Plans.

The District Court was not confronted with two "clearly satisfactory but different plans" (Petition, p. 28; accord, pp. 2, 30, 31, 32) but with a totally unsatisfactory plan. Aside from the fact that it left more than 6,000 students without seats in their home districts (App. 75a; see 15a n. 14), the Masters' Plan would have resulted in 29 schools 30% or less white and 34 schools 93% or more white. (See Statement of the Case, part, 2, above, for details.) The Petition's claim (pp. 22-25, 28) that the Masters' differing assessment of their plan's effects was accurate disregards findings of fact concurred in by two lower courts (App. 14a n. 13, 74a-75a).

The Court, of course, was not searching for racial balance (App. 68a, 70a), but the Masters' Plan would have preserved plainly segregated schools under the very standard the court had used in finding a constitutional violation. 379 F. Supp. at 424. See *United States* v. *Scotland Neck*

[4a] More accurately, the Petition relies not on the Masters' projections but on projections of its own (p. 23), which resemble the Masters' projections in some instances diverge still more widely from the figures found below, and were not advanced below. See page 5 above.

City Bd. of Educ., 407 U.S. 474, 489-90 (1972); *Keyes* v. *School Dist. No. 1*, 413 U.S. 189, 195-98, 199 n. 10 (1973). Nor was the racial composition of these schools unrelated to past discrimination: the court had previously found that the School Committee took numerous actions with the intent and effect of segregating the Boston public schools, and that its systematic program of segregation affected "all of the city's students, teachers and school facilities". *Morgan* v. *Hennigan*, 379 F. Supp. 410, 482 (D. Mass.), *aff'd*, 509 F.2d 580 (1st Cir. 1974), *cert. denied*, 421 U.S. 963 (1975).

Practicalities can impede the desegregation of schools, but Boston is "a city where it has been possible to draw desegregated districts that are relatively small in numbers of students and to limit transportation distances to an average of 2.5 miles each way within a district" (App. 75a; see 19a). The City's area is not large, and the black population lives in an elongated area running down its axis. Plaintiffs Exhibits 290, 290A, 290C.[5] This case is thus very different from the cases cited in the Petition (p. 29 n. 21) and distinguished by the Court of Appeals (App. 19a n. 17).

The assertion (Petition, pp. 28-29) that the lower courts refused to consider factors such as the amount of busing, cost, community acceptance, and potential for resegregation is wholly mistaken. As shown above (Statement of the Case, part 1), the courts gave careful and successful attention to these factors, and there is not the slightest reason for this Court to review the particular balance they struck. No student was bused as much as 25 minutes, and average rides were 10-15 minutes. Compare *Swann*, 402 U.S. at 30; *Winston Salem-Forsyth Bd. of Educ.* v. *Scott*, 404 U.S. 1221, 1227 (1971) (Burger, C. J. Circuit Justice). Twenty-one thousand students were to be bused,

[5] A map similar to these exhibits may be found as Appendix E to the Boston Home and School Association's petition, No. 75-1466.

as compared to 17,000 bused under the State Plan, and more than 30,000 using buses or public transportation under the segregated system. App. 77a, 101a-102a. Compare *Swann,* 402 U.S. at 6, 30 (and Court of Appeals opinion, 431 F.2d at 143-45). Without imposing a uniform racial ratio, and indeed leaving eleven 95% white schools in East Boston, the court's plan promised to eliminate all other racially identifiable schools, bringing them within a range of about 30% to 70% white. App. 18a, 35a, 76a. Compare *Swann*, 402 U.S. at 9, 22-25.[6] The System's grade structure was left untouched, and students had the chance to stay in their own community school districts. App. 89a, 99a. Compare *Swann,* 402 U.S. at 9-10, 27-29.

While the Petition makes much of financial considerations, the record by no means demonstrates that the court's plan is significantly more expensive than the Masters' Plan, much less unreasonably costly. The court may have increased the amount of busing over that required by the Masters' Plan, though this is unclear. Masters' Plan, p. 52 and n. 1 (busing estimates ranging from 10,700 to more than 26,000); App. 15a n. 14. Any extra expense, however, could be expected to be borne by the state (App. 19a-20a), which supports the District Court's plan. On the other hand, the court reduced the number of magnet schools proposed by the Masters (Masters' Plan, App. E, p. 23; No. 75-1445, A. 177), thus saving money (though part of these schools' cost might also have been paid for by the state). And the court saved money by closing schools (App. 102a), though it did not go quite as far in this respect as did the Masters' Plan. Courts have rightly resisted claims that financial problems can justify denying students their right to a desegregated education.[7] If extraordinary expenses can justify adopting a plan which leaves segregated schools in existence, at the very

[6] The District Court rejected a still more effective plan (App. 4a, 67a).

[7] *Goss* v. *Bd. of Educ.*, 482 F.2d 1044, 1046 (6th Cir. 1973), *cert. denied*, 414 U.S. 1171 (1974); *Clark* v. *Bd. of Educ.*, 465 F.2d 1044, 1046 n. 5 (8th Cir. 1972); *United States* v. *Texas Educ. Agency*, 467 F.2d 848, 875 (5th Cir. 1972); *Dowell* v. *Bd. of Educ.*, 338 F. Supp. 1256, 1272 (W.D. Okla.), *aff'd*, 465 F.2d 1012 (10th Cir. 1972); *Vaughns* v. *Bd. of Educ.*, 355 F. Supp. 1051, 1059 n. 23 (D. Md. 1972); see *Swann*, 402 U.S. at 28; *Griffin* v. *School Bd.*, 377 U.S. 218, 232-34 (1964).

least it is for those who support such a result to bear the burden of proving the need. See *Swann,* 402 U.S. at 26; *Green* v. *County School Bd.*, 391 U.S. 430, 439 (1968). Here, the Petitioner failed to do so — not even the city budget and tax rate were submitted below, much less a cost comparison between plans — despite his access to budgetary evidence. The financial assertions of the Petition (pp. 10-12) are just not part of the record.

Any theory that problems of "resegregation" made it improper to modify the Masters' Plan is still less plausible. Indeed, resegregation considerations *supported* the modification, as the District Court explained (App. 75a). If the Petitioner means that the possibility that desegregation might increase "white flight" from Boston schools should have molded the court's actions, he still fails to raise a significant issue on this record. First, the District Court, relying on expert testimony and the opinion of the Masters, found no adequate evidentiary basis for making such a prediction. App. 71a n. 7. Attempts to overthrow this finding by submitting new evidence on appeal did not succeed (App. 30a n. 29). See *Hills* v. *Gautreaux*, 44 U.S.L.W. 4480, 4483 n. 11 (1976). Second, this Court has held that fears of "white flight" and other resistance cannot "be accepted as a reason for achieving anything less than complete uprooting of the dual public schools system." *United States* v. *Scotland Neck City Bd. of Educ.*, 407 U.S. 484, 490-91 (1972); accord, *Monroe* v. *Bd. of Comm'rs*, 391 U.S. 450, 459 (1968); see *Milliken* v. *Bradley*, 418 U.S. 717, 747 n. 22 (1974); App. 32a-33a.[8]

[8] Even less persuasive is the Petition's suggestion (p. 28) that community preference for a more segregative plan could validate it when a better plan is available. In any event, no evidence of community preference was offered, and its relevance was not argued to the Court of Appeals. *Cf. United States* v. *Hinds County School Bd.*, 417 F.2d 852, 858 (5th Cir. 1969) (opinion polls). The District Court did shape its plan so as to promote community acceptance, as explained in the Statement of the Case, part 1, above.

Third, even assuming some relevant relation between desegregation and white flight, the record still furnishes no reason to believe that the Masters' Plan would have been so much less productive of white flight than the court's plan that it would be preferable, much less required. See App. 31a n. 30. Certainly it was not designed on the theory that desegregation would increase white flight, since the Masters regarded that theory as a "misleading fiction" (App. 71a n. 7).

The Masters' Plan, of course, was not the product of the local school authorities, who had repeatedly defaulted in their obligation to propose a viable remedy. App. 62a-67a. That default left the court with the power and duty "to fashion a remedy that will assure a unitary school system." *Swann,* 402 U.S. at 16. The Masters were appointed to provide recommendations to the District Court, not to supersede it. App. 14a n. 13. Although their plan was entitled to respect, it could not divest the District Court of its own duty to frame a plan eliminating the dual school system "root and branch", particularly since the plan was based on erroneous factual assumptions. App. 14a n. 13. While "the masters' report and recommendations contained the key elements and formed the foundation of the plan promulgated by the court" (*Morgan* v. *Kerrigan,* 401 F. Supp. 270, 272 (D. Mass. 1975)), the court properly reconsidered and improved the plan. Since those improvements were reached with full attention to all relevant factors, there is no reason for this court to depart from its practice of not reviewing the details of desegregation plans.

C. This Case Presents No Issue Under the Equal Educational Opportunities Act.

The Petition discusses (pp. 32-35) the Equal Educational Opportunities Act of 1974, 20 U.S.C. §§ 1701 et seq.,

but it fails to identify any issue raised under the Act on this record.

Tht one issue specified by the Petition (p. 2) — whether the Act required the court, "in choosing between two desegregation plans, both of which would have satisfied the constitutional mandate to eradicate segregation, to adopt the plan which involved less busing" — is simply not present. The Masters' Plan would have left 29 schools 30% or less white and 34 schools 93% or more white, and would have left thousands of students without community district seats. These failures were without any justification in terms of practicalities, as is shown by the court's success in framing an alternative. (See Statement of the Case, part 2, and Argument, part B, above.) The Petition's assertions to the contrary are based on factual claims rejected by both lower courts. (See Statement of the Case, part 2, and Argument, part A, above.) The District Court strove successfully to minimize busing; *fewer* students may now use transportation than did so under the segregated system. (See Statement of the Case, part 1, above.) Under these circumstances, to call the Masters' Plan constitutionally acceptable is wholly inconsistent with this Court's decisions. E.g., *Davis* v. *Bd. of School Comm'rs,* 402 U.S. 33 (1971); see *United States* v. *Scotland Neck City Bd. of Educ.,* 407 U.S. 484 (1972); *Swann,* 402 U.S. at 22-31. Even the assertion that the Masters' Plan would have required substantially more busing than the court's modifications is questionable (App. 15a n. 14).

Making "every effort to achieve the greatest possible degree of factual desegregation" (*Swann,* 402 U.S. at 26) of course requires a balancing process in which the removal of racially identifiable schools may sometimes yield to competing practicalities. This process was sensitively carried out by the District Court (e.g., App. 67a-77a), and carefully reviewed by the Court of Appeals (App. 13a-20a).

Having ascertained that the District Court applied correct legal standards — including those laid down by the Act — to the facts without abusing its discretion, the Court of Appeals did not reexamine *de novo* all the merits and demerits of the Masters' Plan and court modifications, contenting itself with a considered finding that the District Court's preference was reasonable (App. 18a-20a). This approach is what the Petition seemingly refers to as making the Act meaningless (pp. 28, 33). The Act, however, does not purport to require *de novo* appellate review of every desegregation plan. What it does require, what the District Court did, and what the Court of Appeals reviewed, is resort to busing only as a last resort and only to the extent needed for the "removal of the vestiges of the dual school system" (20 U.S.C. § 1701(b)).

Since the Petition (p. 33) concedes that "Congress did not attempt to prohibit busing of students", it may be superfluous to add that the Act provides that it is "not intended to *modify* or diminish the authority of the courts of the United States to enforce *fully* the fifth and fourteenth amendments" (20 U.S.C. § 1702(b); emphasis added). See *Brinkman* v. *Gilligan*, 518 F.2d 853, 856 (6th Cir. 1975). Legislative history confirms that the Act, in the form finally adopted, was concerned with the priority of remedies and not with the prohibition of constitutionally required desegregation.[9] This Court had not explicitly specified the order of preference among remedies. It had, however, made clear that actual desegregration is required to the extent practicable in a school system pervaded by past discrimination, and that this requirement is not simply

[9] Sen. Conf. Rep. No. 93-1026, 1974 U.S. Code, Cong. & Admin. News 4222. This view was shared by proponents of antibusing legislation [e.g., 120 Cong. Rec. S. 13378, 13384, 13351 (Sens. Gurney, Roth, Dominick); 120 Cong. Rec. H. 7403, 7417 (Reps. Waggoner, Hogan)] and opponents [20 Cong. Rec. S. 13349, 13378 (Sens. Pell, Javits, Muskie); 120 Cong. Rec. H. 7389 (Rep. Drinan).]

a matter of educational or judicial policy (see *Swann*, 402 U.S. at 16, 22, 28). Congress has no power — and the Act claims none — to authorize the continuance of unconstitutionally segregated schools. *Katzenbach* v. *Morgan*, 384 U.S. 641, 651 n. 10 (1966); see *Oregon* v. *Mitchell*, 400 U.S. 112, 128-29, 204, 249 n. 31 (1970); *United States* v. *Scotland Neck City Bd. of Educ.*, 407 U.S. 484 (1972); *North Carolina Bd. of Educ.* v. *Swann*, 402 U.S. 43 (1971); *Cooper* v. *Aaron*, 358 U.S. 1, 18 (1958).

The lower courts here gave the Act a full and sympathetic reading. The findings required by the Act were made (App. 101a-102a). Busing was minimized: only 21,000 out of 84,000 students were to be bused, a minor increase over the State Plan, and less than the number using busing or public transportation before desegregation started (App. 13a, 62a, 77a, 101a-102a). Extensive use of magnet schools, school closing, new construction already under way, and desegregative transfers fulfilled the Act's stress on alternative remedies. The community school districts responded to its emphasis on neighborhood schools. See Statement of the Case, part 4, al
Mere discussion of the significance of the Act cannot compensate for the absence of an issue arising under it. No such issue is raised by this record.

Conclusion

This Court has long recognized that the framing of desegregation plans upon the default of local school authorities is primarily a function for the District Courts. *Brown* v. *Bd. of Educ.*, 349 U.S. 294, 299 (1955); *Swann*, 402 U.S. at 28. Here, the default was contemptuous and continuing (App. 9a-13a, 43a-44a, 50a-51a, 62a-67a). The court then shaped a moderate plan for a complex school system on the basis of a massive record. App. 6a-7a. The Petition asks this Court to comb through that record and resurrect a plan which had to be modified when it

became clear that it was based on erroneous student data. It relies on factual theories outside the record, claims not raised below, and assertions about the proceedings which are belied by the lower courts' painstaking and successful efforts to minimize busing and shape a plan which would be practical as well as desegregative. Only by such contentions can issues even arguably deserving of certiorari be summoned up. The issues are not there, and certiorari should be denied.

Respectfully submitted,

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